

## EXHIBIT D

**FILED**  
SAN DIEGO SUPERIOR COURT

APR 11 2006

CLERK OF THE SUPERIOR COURT  
BY D. ZOLEZZI

**THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN DIEGO**

IN THE MATTER OF THE APPLICATION OF: } HC 14494 (6th Petition)  
PABLO AGRIOS } CR 95364  
(CDC No. E-17284), } ORDER DENYING PETITION FOR WRIT  
Petitioner. } OF HABEAS CORPUS

AFTER REVIEWING THIS SIXTH PETITION FOR WRIT OF HABEAS CORPUS AND THE PREVIOUS HABEAS CORPUS PETITIONS AND THE ORDERS DENYING THEM IN THE ABOVE REFERENCED MATTER, THE COURT FINDS AS FOLLOWS:

On April 7, 1989, a jury convicted Petitioner of second-degree murder. The jury also found true the allegation that Petitioner personally used a firearm in the commission of the offense. Petitioner was sentenced to an indeterminate term of 15 years to life, plus an additional and consecutive two years for the firearm enhancement. The judgment was affirmed on appeal. (Case No. D010237.) Petitioner has sought habeas corpus relief on multiple occasions in this court and in the Courts of Appeal. These requests have repeatedly been denied.

25 On October 29, 2004, Petitioner filed his fifth petition for habeas corpus relief in this  
26 court, challenging the May 18, 2004 decision of the Board of Prison Terms (now known as the  
27 Board of Parole Hearings, hereinafter referred to as BPH) finding him unsuitable for parole.  
28 More specifically, Petitioner contended the BPH's finding that he would pose an unreasonable

1 risk of danger to society or a threat to public safety if released conflicts with all the evidence  
2 presented at the hearing, thereby violating his Constitutional liberty interests and due process  
3 rights.

4 That Petition was denied because the BPH's determination that Petitioner was not yet  
5 suitable for parole was based on its finding that he would pose an unreasonable risk of danger to  
6 society or a threat to public safety if released from prison. This finding was primarily based on  
7 the nature of the commitment offense and the manner in which it was carried out, as well as  
8 ongoing concern with Petitioner's ability to control his temper in stressful situations. "The nature  
9 of the prisoner's offense, alone, can constitute a sufficient basis for denying parole." In Re  
10 Rosenkrantz (2002) 29 Cal.4<sup>th</sup> 616, 682. The Rosenkrantz Court also said: "We uphold that  
11 decision [of the BPH] if it is supported by 'some evidence' based upon the factors specified by  
12 statute and regulation." Id., at 658. "Some evidence" supported this finding by the BPH in this  
13 case after the hearing in May, 2004.

14 Petitioner has now filed his sixth habeas corpus petition with this Court on the ground  
15 that the BPH illegally used Penal Code § 3041(b) at his most recent parole suitability hearing on  
16 December 6, 2005, to find him unsuitable for parole because he claims there "is not a modicum  
17 of evidence" that he is a current threat to society or otherwise unsuitable for parole. Petitioner  
18 believes that this decision against him was arbitrary and capricious and that it violated his state  
19 and federal due process rights.

20 Actually, a review of the material Petitioner has provided (and not provided) with this  
21 most current habeas corpus petition shows that his contention that there "is not a modicum of  
22 evidence" is erroneous.

23 First, (and as discussed more completely below), Petitioner failed to provide a full and  
24 complete copy of the transcript from the December 6<sup>th</sup> parole suitability hearing. There is no  
25 explanation provided as to why the Court was not afforded the complete document. Moreover,  
26 Petitioner has also attached a copy of a transcript of a deposition of a Michael Brady that  
27 apparently was taken for a habeas corpus petition brought by another defendant in another case  
28 in another county, again with no explanation as to why it is relevant to the present Petitioner's

1 case. For this reason alone (failure to provide the full transcript), this Court could deny this  
2 Petition because it has not been provided with all the facts upon which it could base a fully  
3 informed decision.

4 However, Petitioner has provided the complete eight and one-half pages of the BPH's  
5 final decision after the December 6, 2005, suitability hearing. A careful review of those pages,  
6 plus the hearing transcript pages Petitioner did provide, show that there was indeed, more than a  
7 modicum of evidence that would qualify the finding of "some evidence" necessary for this Court  
8 to deny this Petition.

9 As in the past, the BPH noted that the underlying murder was cruel and callous with  
10 absolutely no motive. **However**, before the rendering of the decision could continue, Petitioner's  
11 counsel stated that Petitioner would like to leave the room and that the reading of the decision  
12 could continue with just the attorney present. (Transcript, 99:11-13).

13 Immediately after Petitioner left the room, the BPH stated the "several reasons as to why  
14 we determine three years" before Petitioner will have his next suitability hearing.

15 In summary, it appears to this Court that the BPH believed Petitioner was a current threat  
16 to society because Petitioner was being deceptive (Transcript 100:13-14) with a "selective and  
17 minimized (sic) memory." (Transcript 105:20-21)

18 Specifically, the BPH was very concerned because Petitioner continues to minimize the  
19 underlying crime. The commissioners believed Petitioner was "attempting to wordsmith this  
20 crime" by changing his description of it from an accidental to an unintentional act. The BPH  
21 believed that those terms were "very far apart." (Transcript, 99:19-24) The panel was also  
22 concerned that Petitioner's version that he was "upset" when he committed the murder was a  
23 considerable downsizing of the words "angry and infuriated," "which makes him look a little  
24 better[,] a little nicer." (Transcript 99:24-26, 100:1-2).

25 The commissioners did not believe Petitioner had yet taken responsibility for his crime,  
26 and they were particularly concerned that he had not been completely honest with his current  
27 wife regarding his plans to live with another woman if he was forced to serve parole in San  
28 Diego County. That was mentioned at least three separate times in the eight and one-half page

1 decision (Transcript 100:6-14, 103:5-26 – 104:1-2, and 105:16-21).

2 The BPH believed that Petitioner was still attempting to place some of the blame for the  
3 murder back on the victim and the claim that he never battered her before the murder was a total  
4 lie. (Transcript 100:14-24). This belief apparently was strengthened by Petitioner's behavior  
5 when the decision was being rendered: "And I think there's something to say about the fact that  
6 he didn't want to hear the truth here and didn't want to face the facts and left the hearing  
7 prematurely." (Transcript 100:26, 101:1-3).

8 As noted above, Petitioner was selective in which transcript pages he provided to this  
9 Court with the present Petition. While that in itself may mean nothing, taken with the totality of  
10 the reasons the BPH believed Petitioner was not suitable for parole because he was a risk  
11 because he was deceptive, only exemplifies the perception the BPH had of the Petitioner.

12 For instance, there apparently was some discussion in the omitted pages about the culture  
13 of a Latin family "where a man is the boss of the house and ordinarily the wife jumps at the snap  
14 of a finger." (Transcript 101:21-23) What is key is that the commissioner then states: "He  
15 [Petitioner] states that no matter how much time he had to do, there's no guarantee that he would  
16 not ultimately wind up in a similar position under similar circumstances." (Transcript 101:26.  
17 102:1-3)

18 The BPH was very concerned about this and stated it was one of the reasons for the three-  
19 year period before suitability would be re-visited. The commissioner also was concerned that a  
20 psychiatric evaluation was made invalid because Petitioner withheld valuable information.  
21 (Transcript 102:24-26,103:1-5). Because Petitioner failed to provide the full transcript, it is  
22 impossible to know if this withholding was something Petitioner did at this hearing or at a  
23 previous hearing.

24 Thus, taken as a whole, a review of what was (and what was not) presented with this  
25 Petition shows that there was more than "some evidence" that Petitioner was deceptive and still  
26 unable or unwilling to accept full responsibility for the murder and that, despite all of the good  
27 things that Petitioner has accomplished during this incarceration, he still is a current risk to  
28 society and should not be paroled at this time.

1 Petitioner cites often to a recent case that was decided in the local Fourth District Court  
2 of Appeal as being very similar and on point with his case: In Re Shaputis (2005) 135  
3 Cal.App.4<sup>th</sup> 217. While in many ways Shaputis is *not* on point, the law cited therein definitely is  
4 relevant and pertinent: "The "some evidence" standard is "extremely deferential" and requires  
5 only " 'a modicum of evidence.' " (Rosenkrantz, supra, 29 Cal.4th at pp. 664-665.) A court may  
6 not vacate an administrative decision subject to the "some evidence" review simply because it  
7 disagrees with the BPT's assessment. (Id. at p. 679.) The decision must be "devoid of a factual  
8 basis" to be overturned. (Id. at p. 658.) Because judicial review of a parole denial is to ensure  
9 that a decision of the BPT is not arbitrary and capricious, thereby depriving the prisoner of due  
10 process of law, "the court may inquire only whether some evidence in the record before the  
11 [BPT] supports the decision to deny parole, based upon the factors specified by statute and  
12 regulation." (Id. at pp. 657-658.)" Shaputis 135 Cal.App.4th, at 226.

13 As noted in detail above, the BPH decision in this present case was not "devoid of a  
14 factual basis," so it cannot be overturned.

15 The local appellate court noted at the end of its decision that "Shaputis exhibited no  
16 violent tendencies toward anyone other than his wife and one of his daughters, and the violence  
17 he demonstrated was intertwined with his alcohol problem. The only evidence before the BPT  
18 was that Shaputis had more than a decade of demonstrated commitment to remaining sober, and  
19 there was not a scintilla of violence in his nearly two decades of incarceration. Accordingly, the  
20 BPT's conclusion Shaputis remained a danger to society, to the extent it was premised on a  
21 former lifestyle that all of the evidence showed was a historical relic, is so lacking in any  
22 medical, psychological or behavioral evidentiary support that it is arbitrary and capricious,  
23 within the deferential standards articulated by Rosenkrantz, supra, 29 Cal.4th 616." Id., at 231-  
24 232.

25 Again, as detailed above, there are two differences with the present case: (1) The present  
26 Petitioner failed to provide all the evidence the BPH heard, and (2) the BPH clearly articulated  
27 reasons why they believed Petitioner was deceptive and thus, impliedly under all the  
28 circumstances of this case, was a current risk to society.

1 Interestingly, in Justice Benke's dissent, she notes something that is on point to the  
 2 present case: "Instead, the court held the board may decline to set a parole date in an individual  
 3 case "if it concludes, on relevant grounds with support in the evidence, that the grant of a parole  
 4 date is premature for reasons of public safety.'" Id., at 234. This is exactly what and why this  
 5 present Court is making a similar decision.

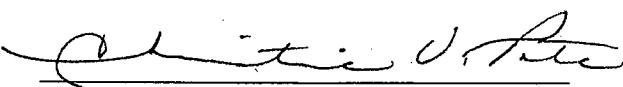
6 Finally, the same dissent sets forth what this Court adopts as an underlying reason for  
 7 declining to overturn the BPH's decision of December 6, 2005: "Clearly, if an inmate is not  
 8 suitable for parole because considerations of public safety demand a more lengthy period of  
 9 incarceration, the Board of Prison Terms is not required to set a release date. Our review of the  
 10 board's decisions is highly deferential and only a modicum of evidence is needed to support the  
 11 board's decision. (In re Rosenkrantz, supra, 29 Cal.4th at p. 667.) This deference is based on two  
 12 important considerations: first, we are reviewing the discretionary actions of a separate branch of  
 13 government; and second, the board has far greater expertise and experience in dealing with  
 14 determining public safety than do the courts."

15 Therefore, for all of the above-stated reasons, this sixth Petition is DENIED.

16 A copy of this Order shall be served upon Petitioner and the San Diego Office of the  
 17 District Attorney, Appellate Division.

18 IT IS SO ORDERED.

19 DATED: 11 Apr 06

  
 20 CHRISTINE V. PATE  
 21 JUDGE OF THE SUPERIOR COURT

22 I hereby certify that the foregoing instrument is a  
 23 full, true & correct copy of the original on file in  
 24 this office, that said document has not been revoked,  
 25 annulled or set aside, and it is in full force and effect.

Attest: APR 11 2006 2 4 PM

26 of California, in and for the County of San Diego

27 By [Signature] Deputy

28

<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> <ul style="list-style-type: none"> <li><input checked="" type="checkbox"/> COUNTY COURTHOUSE, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814</li> <li><input type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827</li> <li><input type="checkbox"/> FAMILY COURT, 1501 6<sup>TH</sup> AVE., SAN DIEGO, CA 92101-3296</li> <li><input type="checkbox"/> MADGE BRADLEY BLDG., 1409 4<sup>TH</sup> AVE., SAN DIEGO, CA 92101-3105</li> <li><input type="checkbox"/> KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187</li> <li><input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE DR., VISTA, CA 92083-6643</li> <li><input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN ST., EL CAJON, CA 92020-3941</li> <li><input type="checkbox"/> RAMONA BRANCH, 1428 MONTECITO RD., RAMONA, CA 92065-5200</li> <li><input type="checkbox"/> SOUTH COUNTY DIVISION, 500 3<sup>RD</sup> AVE., CHULA VISTA, CA 91910-5649</li> <li><input type="checkbox"/> JUVENILE COURT, 2851 MEADOW LARK DR., SAN DIEGO, CA 92123-2792</li> <li><input type="checkbox"/> JUVENILE COURT, 1701 MISSION AVE., OCEANSIDE, CA 92054-7102</li> </ul>		<b>FOR COURT USE ONLY</b>  <b>F I L E D</b> Clerk of the Superior Court <b>APR 13 2006</b> By: <u>R. Love</u> Deputy
PLAINTIFF(S)/PETITIONER(S)		
The People of The State of California		
DEFENDANT(S)/RESPONDENT(S)		JUDGE: _____ DEPT: _____
PABLO AGRIOS		
<b>CLERK'S CERTIFICATE OF SERVICE BY MAIL</b> (CC 1013a(4))		CASE NUMBER <b>HC14494</b> <b>CR95364</b>

I, STEPHEN LOVE, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at:  San Diego  Vista  El Cajon  
 Chula Vista  Oceanside  Ramona, California.

<u>NAME</u>	<u>ADDRESS</u>
PABLO AGRIOS	P.O. BOX 689 Z-130U SOLEDAD, CA 93960-0689 #E17284
SAN DIEGO COUNTY DISTRICT ATTORNEY'S OFFICE APPELLATE DIVISION	P.O. BOX 121011 SAN DIEGO, CA 92112-1011

STEPHEN LOVE  
CLERK OF THE SUPERIOR COURT

Date: 04/13/06

By R. Love, Deputy

Name PABLO AGRIO  
 Address P.O. BOX 689 Z-130U  
SOLEDAD, CA 93960-0689  
 CDC or ID Number E17284

F I L E D

Clerk of the Superior Court

FEB 17 2006

By JD Deputy

## SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

(Court)

WRIT GRANTED/DENIED  
DATE 04-11-06

PABLO AGRIO,

Petitioner

vs.

CA BOARD OF PRISON TERMS

Respondent

## PETITION FOR WRIT OF HABEAS CORPUS

No.

HC 14494

6th Petition

(To be supplied by the Clerk of the Court)

CR 95364

## INSTRUCTIONS — READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.

• Read the entire form *before* answering any questions.

• This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

• Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

• If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

• If you are filing this petition in the Court of Appeal, file the original and four copies.

• If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

• Notify the Clerk of the Court in writing if you change your address after filing your petition.

• In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court [as amended effective January 1, 1999]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

This petition concerns:

A conviction  Parole  
 A sentence  Credits  
 Jail or prison conditions  Prison discipline  
 Other (specify): \_\_\_\_\_

1. Your name: **PABLO AGRI**

2. Where are you incarcerated? **CORRECTIONAL TRAINING FACILITY - SOLEDAD**

3. Why are you in custody?  Criminal Conviction  Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

**SECOND DEGREE MURDER WITH USE OF A WEAPON**

b. Penal or other code sections: **187 PC; 12055 PC**

c. Name and location of sentencing or committing court: **SAN DIEGO SUPERIOR COURT**

d. Case number: \_\_\_\_\_

e. Date convicted or committed: \_\_\_\_\_

f. Date sentenced: \_\_\_\_\_

g. Length of sentence: **17 YEARS TO LIFE**

h. When do you expect to be released? \_\_\_\_\_

i. Were you represented by counsel in the trial court?  Yes.  No. If yes, state the attorney's name and address:

\_\_\_\_\_

4. What was the LAST plea you entered? (check one)

Not guilty  Guilty  Nolo Contendere  Other: \_\_\_\_\_

5. If you pleaded not guilty, what kind of trial did you have?

Jury  Judge without a jury  Submitted on transcript  Awaiting trial

## 6. GROUNDS FOR RELIEF

**Ground 1:** State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

SEE ATTACHED

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: who did exactly what to violate your rights at what time (when) or place (where). (*If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.*)

b. Supporting cases, rules, or other authority (optional):

*(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)*

7. Ground 2 or Ground \_\_\_\_\_ (*if applicable*):

SEE ATTACHED

a. Supporting facts:

Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment?  Yes.  No. If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"):

---

b. Result: \_\_\_\_\_

c. Date of decision: \_\_\_\_\_

d. Case number or citation of opinion, if known: \_\_\_\_\_

e. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

f. Were you represented by counsel on appeal?  Yes.  No. If yes, state the attorney's name and address, if known:

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9. Did you seek review in the California Supreme Court?  Yes.  No. If yes, give the following information:

a. Result: \_\_\_\_\_ b. Date of decision: \_\_\_\_\_

c. Case number or citation of opinion, if known: \_\_\_\_\_

d. Issues raised: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

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11. Administrative Review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

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b. Did you seek the highest level of administrative review available?  Yes.  No.  
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court?  Yes. If yes, continue with number 13.  No. If no, skip to number 15.

13. a. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding (for example, "habeas corpus petition") \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

b. (1) Name of court: \_\_\_\_\_

(2) Nature of proceeding: \_\_\_\_\_

(3) Issues raised: (a) \_\_\_\_\_

(b) \_\_\_\_\_

(4) Result (Attach order or explain why unavailable): \_\_\_\_\_

(5) Date of decision: \_\_\_\_\_

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

16. Are you presently represented by counsel?  Yes.  No. If yes, state the attorney's name and address, if known:

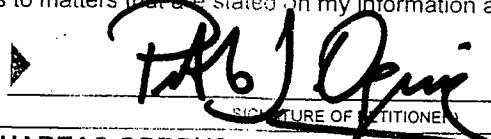
17. Do you have any petition, appeal, or other matter pending in any court?  Yes.  No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

2/14/06

  
SIGNATURE OF PETITIONER

1 PABLO AGRIO E-17284  
2 P.O. BOX 689 ZW-130U  
SOLEDAD, CA 93960-0689  
3 in pro per

4

5 SUPERIOR COURT OF CALIFORNIA  
6 IN AND FOR THE COUNTY OF SAN DIEGO

7

8

9 In re AGRIO

10 Petitioner,

11 v.

12 A.P. KANE, WARDEN (A), et al.

13 Respondent

14 ) Case No.: \_\_\_\_\_

15 ) PETITION FOR WRIT OF HABEAS

16 ) CORPUS

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THE BOARD OF PRISON TERMS ILLEGALLY USED PENAL CODE SECTION 3041(b) [THE EXCEPTION] TO FIND PETITIONER UNSUITABLE FOR PAROLE. AS THERE IS NOT A MODICUM OF EVIDENCE THAT PETITIONER IS A CURRENT THREAT TO SOCIETY OR OTHERWISE UNSUITABLE FOR PAROLE THE DECISION WAS ARBITRARY AND CAPRICIOUS VIOLATING PETITIONER'S STATE AND FEDERAL DUE PROCESS RIGHTS.

On DECEMBER 6, 2005, Petitioner PABLO AGRIOS, E-17284 (hereinafter "Petitioner"), was provided a Life Term Parole Consideration Hearing before the Board of Prison Terms (hereinafter "Board", "BPT", or "Panel"); Please refer to Exhibit 'A' which is the Hearing Transcript (hereinafter "HT" or "Transcript"). Said Hearing was Petitioner's FOURTH parole suitability hearing. Petitioner's Minimum Eligible Parole Date (hereinafter "MEPD"), was APRIL 30, 2000.<sup>1</sup> The purpose of this Board hearing was for the setting of Petitioner's term uniformly<sup>2</sup> to his offense and for a finding of suitability for parole (See Penal Code § 3041.5; In re Edward Ramirez, 94 Cal.App.4<sup>th</sup> 541 (2001); McQuillion v. Duncan, (9<sup>th</sup> Cir.) 306 F.3d 895; In re Norman Morrall, (2002) 102 Cal.App.4<sup>th</sup> 280; In re Rosenkrantz, (2002) 29 Cal.App.4<sup>th</sup> 660; In re Mark Smith, (2003) Cal.App.4<sup>th</sup> 343; and the recent Biggs v. Terhune, (2003 9<sup>th</sup> Cir.) 334 F.3d 910).

The result of this Board hearing was an erroneous and unlawful finding of unsuitability and a release date was not set. Instead, Petitioner was given a three (3) year denial and did not appeal this decision through the administrative remedy because the Board has eliminated the BPT Appeals Unit and no longer allows for the filing of administrative appeals on BPT denials

1 – The Court of Appeal in In re George Scott, (2004) 119 Cal.App.4th 871, reaffirmed the rationale of the Ramirez and Smith Courts when it declared “...parole is the rule, rather than the exception, and conviction for second degree murder does not automatically render one unsuitable. (In re Smith, (2003) 114 Cal.App.4<sup>th</sup> 343, 366). In re Ramirez, supra, 94 Cal.App.4<sup>th</sup> 549 ...[a]ll violent crimes demonstrate the perpetrator’s potential for posing a grave risk to public safety, yet parole is mandatory for violent felons serving determinate sentences. Penal Code § 3000 subd. (b)(1).) And the Legislature has clearly expressed its intent that when murders – who are the great majority of inmates serving indeterminate sentences – approach their minimum eligible parole date, the Board shall normally set a parole release date...” (id. at p. 570).

2. – The Court of Appeal on June 24, 2004, in In re George Scott, supra, 119 Cal.App.4<sup>th</sup> at 887 fn. 7, also reaffirmed the Legislative Intent of Uniform terms by stating: “The first two sentences of the DSL declare ‘that the purpose of imprisonment for a crime is punishment’ and that [t]his purpose is best served by terms proportionate to the seriousness of the offense with provisions for uniformity in the sentences of offenders committing the same offense under similar circumstances. (Penal Code § 1170, subd. (a)(1).) Nothing in the DSL or its legislative history suggests that legislative concern with uniformity was limited to those serving determinate terms. Penal Code § 3041 shows that this interest does extend to individuals such as [this Petitioner] who are serving indeterminate life terms. (Id., citing Ramirez, supra 94 Cal.App.4<sup>th</sup> at 559).

1 of parole for indeterminately sentenced prisoners such as Petitioner. Petitioner submits that the  
2 Board's regulation, that is the California Code of Regulations (hereinafter "CCR"), § 2402(a)  
3 **DEMANDS that the Board set a release date unless Petitioner CURRENTLY presents an**  
4 **unreasonable risk of danger to the public.** Petitioner submits that the representing District  
5 Attorney did not provide any new and/or additional evidence whatsoever that Petitioner is an  
6 unreasonable risk of danger to the public or otherwise unsuitable for parole.

7 Additionally, Petitioner submits that the Board speaks in meaningless generalities and fails  
8 to address the exact nature of Petitioner's CURRENT character. By not doing so, the Board  
9 violated the intent and spirit of Penal Code (hereinafter "PC"), § 3041.5<sup>3</sup> and In re Ramirez,  
10 supra, which dictates that the Board shall normally set a parole release date. (citing Biggs v.  
11 Terhune, supra).

12 The Court in Biggs, supra, held that the Board's continued use of the crime (or any other  
13 unchanging circumstances) as a basis for denial of parole when Petitioner's Institutional  
14 Behavior remains exemplary may be a violation of both State and Federal Due Process.

15 Since his incarceration, Petitioner has had no occurrence of serious or violent disciplinary  
16 action, thus exemplifying himself as a model prisoner (even the DA acknowledged this).  
17 Petitioner seeks acknowledgment of the facts that since 1989, there has been thereafter a  
18 continuous sixteen (16) year history free of any disciplinary action or occurrence. Petitioner  
19 submits that the Board's failure to uniformly measure his offense and set his term  
20 proportionately to others similarly situated and to find him suitable for parole violates both  
21 State and Federal due Process. Also, the current policy of the Board, which will be discussed  
22 more fully infra, is the setting of a parole date which is all too often the exception rather than  
23 the norm, and thus violates Petitioner's Liberty Interest that is present in a parole date; In re  
24 Rosenkrantz, supra; McQuillion v. Ducan, supra; Biggs v. Terhune, supra. At the Petitioner's  
25 board hearing the BPT relied solely on Petitioner's commitment offense and prior history to

26 3 – There is no evidence that the crime is "particularly egregious" to justify the use of the exception clause of PC  
27 § 3041(b); In re Norman Morrall, supra, the court concluded "[W]e agree that an inmate cannot be denied parole  
simply on the type of offense he committed." (See also In re Minnis, 7 Cal.3d at p. 647). To the contrary, it falls  
squarely in the Board's own proportionality matrix CCR § 2403(c) at axis B-II. Without post-conviction credits  
28 Petitioner has served twenty two (22) years. Adding post conviction credits he has served twenty seven (27) plus  
years, essentially reaching his matrix as required. There is no evidence that Petitioner is a current risk or threat to  
society and the Board's conclusions are not supported by the record. (See Biggs, supra).

1 justify its unlawful finding of unsuitability. Beginning at page 98 of Exhibit 'A', the HT, the  
2 Board stated:

3 "Now the panel's reviewed all the documents – all the information received from the  
4 public and relied on the following circumstances in concluding that the prison is not  
5 suitable for parole and would pose an unreasonable risk of danger to society or threat  
6 to public safety if released from prison. We're going to deny your parole for three  
7 years, sir, and I'm going to tell you why. The offense in this case was particularly  
8 cruel and callous absolutely no motive. There was no reason for this offense to have  
9 ever occurred. It was certainly carried out in a dispassionate manner. I have wouldn't  
10 go as far to say it's an execution-style, sir. I would certainly say it's more than  
11 unintentional act or more than an accidental death given your -- given your history as  
12 a police officer, given your history as a Marine around firearm, I just find – I do not  
13 understand how this could have happened. If there wasn't – without retrying this case  
14 at all you are here for second degree murder. I think there was certainly a crime of  
15 passion. We think it's a crime of passion." (HT 98/99 lines 7-26: 1-4)

16 In addition, and with regard to the Petitioner's suitability, the board erred in disregarding  
17 Petitioner's Mental Health Evaluation which is supportive of release (please refer to HT, pg.  
18 61 lines 5-27 line). Petitioner's Psychiatric Reports have been much instructive. Specifically,  
19 Dr. M. Macomber, Ph.D., CTF-Soledad, Staff Psychologist, stated:

20 "Inmate AGRIO has remained entirely disciplinary free throughout his 15 years of  
21 custody, which is very difficult to do. This shows excellent self-control and ability to  
22 get along with others in a stressful environment. His potential for violence within the  
23 institutional environment is definitely below average in comparison to other inmates.  
24 Inmate AGRIO has matured. He no longer is driven by his perfectionist tendencies to  
25 maintain control of his life. He has learned how to negotiate differences with others,  
26 and come to positive resolutions of conflict. He has a good sense of concern and  
27 empathy towards others." (See Exhibit 'A')

28 And under "Assessment of Dangerousness" Dr. Macomber stated:

1        "At this point in his life, his potential for violence in the unstructured setting of the  
 2        community is definitely below average in comparison to other inmates. In comparison  
 3        to the average citizen in the community, based upon his knowledge and experiences,  
 4        his potential for violence is even lower than that." (Id., p. 3)

5        Additionally, the Board ignored that Petitioner has been deemed by the California  
 6        Department of corrections a **Model** prisoner with A-1-A status, and **Not** a threat to society, and  
 7        that Petitioner's crime is not "particularly egregious" (especially cruel and callous) by placing  
 8        Petitioner in a Level II prison setting.<sup>4</sup>

9        Also, in the Life Prisoner Evaluation Report (hereinafter "LPER") attached as Exhibit 'C',  
 10      Petitioner's Correctional Counselor, CC-I Taporco, states:

11        "**Considering the commitment offense, the writer believes AGRIO would**  
 12        **probably pose a low degree of threat to the public at this time, if released from**  
 13        **prison. This is based on that he has received two certificates in Vocational**  
 14        **Computer Repair, as a legal assistant in Paralegal, and BA Degree in Criminal**  
 15        **Justice, and a Juris Doctor in Law. AGRIO remained disciplinary free, and an**  
 16        **active member of Alcoholic Anonymous.**" (Exhibit 'A')

17        Again, in In re Norman G. Morrall, *supra*, the Court concluded; "A refusal to consider the  
 18        particular circumstances relevant to an inmate's individual suitability for parole would be  
 19        contrary to law." Moreover, the Court in Biggs, *supra*, addressed the Board's continued illegal  
 20        use of the crime and/or prior history to justify a denial of parole:

21        "**... a continued reliance... on an unchanging factor, the circumstances of**  
 22        **the offense and conduct prior to imprisonment, runs contrary to the**  
 23        **rehabilitative goals espoused by the prison system and could result in a due**  
 24        **process violation". (Biggs, *supra*, 334 F.3d at 917).**

25  
 26        4. California Code of Regulations, Title 15, section 3375.2 subd. (7)(A) states: "An inmate serving any life term  
 27        shall not be housed in a Level I or II facility if any of the following case factors are present: The Commitment  
 28        Offense involved... unusual violence...." And on June 24, 2004, the Court of Appeal in In re George Scott, *supra*,  
 119 Cal.App.4<sup>th</sup> at 892 fn. 11, found that the Board's regulations provide that even if the crime is "exceptionally  
 callous" an inmate may be found suitable for parole. The Court declared that "Under the Board regulations, base  
 terms for life prisoners are not calculated until after an inmate is deemed suitable for release. (§ 2282, subd. (a).)  
 The regulations therefore contemplate that an inmate may be deemed suitable for release even though his offense  
 demonstrated "exceptionally callous disregard for human suffering." (§ 2402, subd. (c)(1)(D).)" (Id.)

1 In Biggs, *supra*, the appeal was pursuant to his initial suitability hearing. The Petitioner has  
2 now had **FOUR** Board hearings and submits that his most recent denial rests solely on the  
3 commitment offense, (as did his previous hearings in 1999, 2002, and 2004, included herein as  
4 Exhibit 'D"), and therefore violates both State and Federal Due Process. Most importantly,  
5 there is no evidence that the public safety requires a lengthier period of incarceration (please  
6 refer to PC § 3041(b), in relation to other instances of the same crime please refer to PC §  
7 3041.5).

8 Petitioner submits that understanding and perspective of the crime is compelled by the  
9 Board's own proportionality matrix (please refer to CCR Division 2, § 2403(c). The matrix  
10 scale and rating of the more common and routine variations of murder appear to be a  
11 codification of when a crime of this nature can be more egregious than average.

12 Petitioner submits that his crime falls squarely in the matrix [category II, 17-18-19 years].  
13 With post conviction credits, Petitioner has exceeded the maximum by close to TWO (2) years  
14 and without post conviction credit application, Petitioner has served his matrix. The Board fails  
15 in any attempt to substantiate why Petitioner's crime is so heinous as to require that Petitioner  
16 be exempted time and time again from the general rule that a parole date shall normally be set;  
17 please see In re Ramirez, *supra*, wherein the court states:

18 "The Board must weigh the inmate's criminal conduct not against ordinary  
19 social norms, but against other instances of the same crime or crimes. (Ramirez,  
20 *supra*, Cal.App.4<sup>th</sup> at p. 570).

21 Petitioner submits that the record is devoid of the Board making such a comparison.  
22 Similarly, Petitioner's Psychiatric Report evidence, like Biggs, *supra*, is supportive of release;  
23 contrary to the Board's erroneous and specious findings (please see Exhibit 'A'). The court in  
24 Biggs, addressed the Board's illegal usage of needed therapy and other illegal reasons  
25 to justify a highly illegal denial. The Court concluded:

26 "The record in this case and the transcript of Biggs' hearing before the Board  
27 clearly show that many of the conclusions and factors relied upon by the Board  
28 were devoid of evidentiary basis." (Biggs, *supra*, 334 F.3d at p. 915)

1 The Court in Biggs, *supra*, went on to warn the Board that while there was “some  
2 evidence” to use the crime as a basis for denial at his initial hearing, the board’s continued use  
3 of the crime as a basis for continual denials would be a violation of Biggs Federal due process  
4 rights. Petitioner submits that the Board’s sole usage of the initial commitment offense and/or  
5 prior social history, on a continual basis to deny him a parole date has violated his 5<sup>th</sup> and 14<sup>th</sup>  
6 Amendment rights under the United States Constitution to not be deprived of his liberty.

7 **“[T]o ensure that a state created parole scheme serves the public interest  
8 purposes of rehabilitation and deterrence, the Parole Board must be cognizant  
9 not only of the factors required by the state statute to be considered, but also the  
10 concepts embodied in the Constitution requiring due process of law... “[Please  
11 see e.g. in Greenholtz, 442 U.S. at 7-8.]”** (Biggs, *supra*, 334 F.3d at p. 916)

12  
13 **“The Parole Board’s sole supportable reliance on the gravity of the offense and  
14 conduct prior to imprisonment to justify denial of Parole can be initially justified  
15 as fulfilling the requirements set forth by state law. Over time however, should  
16 Biggs continue to demonstrate exemplary behavior and evidence of  
17 rehabilitation, denying him a parole date simply because of the nature of his  
18 offense and prior conduct would raise serious questions involving his liberty  
19 interest in parole... (Id)**

20 Petitioner also submits that the Board has adopted an anti and/or no parole policy *per se*, or  
21 a policy of under-inclusion demonstrating a policy of systematic bias; granting only an  
22 approximate 232 parole dates out of over 11,000 parole hearings, thus violating the legislative  
23 intent of PC § 3041(a) that; “...a parole date shall normally be set in a manner that will provide  
24 uniform terms for offenders with crimes of similar gravity and magnitude...”. And, violating  
25 Petitioner’s State and Federal due process rights as well (please see In re Ramirez, *supra*, at  
26 page 565). Petitioner contends that the evidenced behavior by a quasi-judicial Board, of a  
27 policy demonstrating an approximate 98.5% denial rate, supports the premise that such a policy  
28 exists (i.e. anti and/or no parole policy of under-inclusion or systematic bias): this policy  
violates the strictures of substantive due process.

1 The existence of said policy in denying parole may explain why the Board only grants  
2 parole in less than two (2) percent of the cases it hears; it also explains the bias demonstrated in  
3 the present case.

4 In this case, Petitioner's own circumstances, the Board's pronouncement of numerous  
5 unlawful conclusions, not supported by the record, violates the process due to Petitioner under  
6 the State and Federal Constitutions. Based upon the herein-demonstrated bias, the Board's  
7 decision cannot be shielded by the "some evidence" standard. The only appropriate remedy is  
8 an independent review.

9 Moreover, two recent California Appellate Court decisions have a direct impact on the  
10 review of the instant petition.

11 In **In re Scott**, A108894, California Court of Appeal, First District, Second Division,  
12 October 18, 2005, the court found:

13 On July 4, 1986, Scott shot and killed his wife's lover (Bradford) after he found her  
14 affectionately hugging him, despite promises to break the affair off. Scott went looking for his  
15 wife armed with a .22-caliber handgun and shot the victim two or three times. On July 20,  
16 2004, the BPT found Scott suitable for parole. The Governor reverse the Board's finding. The  
17 Court ordered Scott released. He is now a free man.

18 The Court wrote, "Except for the present offense, two misdemeanor convictions (for  
19 reckless driving and vandalism) arising out of altercations with Bradford and his wife shortly  
20 before the crime, and minor Vehicle Code violations when he was a juvenile, Scott has no  
21 criminal record.

22 The Governor found Scott unsuitable for parole on the basis of his determination the  
23 murder of Bradford was 'especially atrocious' and 'particularly heinous.' According to the  
24 Governor, 'the gravity of the murder committed by Mr. Scott alone is sufficient basis on which  
25 to conclude that his release from prison at this time would pose an unreasonable public safety  
26 risk.' The Court found the determination unsupported by "some evidence."

27 The Court stated, "Denial of parole based upon the nature of the offense alone may rise to  
28 the level of a due process violation as 'where no circumstances of the offense reasonably could  
be considered more aggravated or violent than the minimum necessary to sustain the

1 conviction for that offense. Therefore, an unsuitability determination must be predicated on  
 2 'some evidence that the particular circumstances of the prisoner's crime – circumstances  
 3 beyond the minimum elements of his conviction' – indicated exceptional callousness and  
 4 cruelty with trivial provocation, and thus suggested he remains a danger to public safety."

5 "For example, premeditation was considered in **Rosenkrantz** because, though the prisoner  
 6 had been convicted of 2<sup>nd</sup> degree murder, the evidence showed 'a full week of careful  
 7 preparation, rehearsal and execution,' and that the prisoner 'fired 10 shots at close range from  
 8 an assault weapon and fired at least three or four shots into the victim's head as he lay on the  
 9 pavement,' carried out the crime with 'planning, sophistication, or professionalism.'"

10 "Similarly in **In re Lowe**, 130 Cal.App.4<sup>th</sup> 1405, another 2<sup>nd</sup> degree murder, the prisoner  
 11 purchased the gun shortly before the murder, entered the victim's bedroom in the middle of the  
 12 night while he was asleep, unsuspecting, and in a special relationship of confidence and trust  
 13 with his killer, 'and shot him five times in the head and chest execution style.'"

14 "In **In re Deluna**, 126 Cal.App. 4<sup>th</sup> 585, 2<sup>nd</sup> degree murder again, the petitioner had a  
 15 physical confrontation with the victim in a bar, left the bar, retrieved a rifle, shot the victim in  
 16 the mouth and, as the victim bled and walked around the parking lot, followed him and  
 17 continued firing until he died."

18 "None of these circumstances were present in Scott's case and therefore [his  
 19 circumstances] cannot be considered more aggravated or violent than the minimum necessary  
 20 to sustain a conviction of second degree murder." the said of Petitioner's case.

21 In **In re Shaputis**, 2005 DJDAR

22 "In 1987 a jury convicted Shaputi  
 23 that he used a firearm in the commis  
 24 the possibility of parole, plus a determ

25 Shaputis and Irma had been married for 23 years and their relationshi  
 26 domestic violence. Two years earlier, Irma complained that Shaputis had beaten her and cracked  
 27 her ribs, and approximately 18 months earlier Shaputis had shot at his wife when they had been  
 28 drinking and arguing. Shaputis apparently beat Irma at least two or three times per year and had  
 threatened her with a knife. However, none of these alleged events resulted in criminal charges.

1 On the night of the murder, Shaputis called 911 around 10:00 p.m. and stated he had fought  
2 with his wife and killed her, but claimed it was an accident. The autopsy report concluded Irma  
3 was killed sometime between 8:30 p.m. and 12:30 a.m. and her death was caused by a single  
4 gunshot wound to the neck. The shot had been fired from close range, possibly as close as two  
5 feet, and had entered the neck between the junction of the neck and jaw. Death was apparently  
6 instantaneous. Shaputis was a heavy drinker who became violent when intoxicated, and he had  
7 been drinking on the night of the murder.

8 Shaputis minimum eligible parole date was in September 1998. The BPT considered  
9 materials presented, including the forensic evaluations, and concluded Shaputis was not suitable  
10 for parole because he posed 'an unreasonable risk of danger to society or a threat to the public  
11 safety if released from prison.' The BPT cited two findings for this conclusion. First, the BPT  
12 found the commitment offense was 'carried out in an especially cruel and/or callous manner' and  
13 was 'carried out in a dispassionate and/or calculated manner' because the murder was  
14 committed at close range with a single shot. Second, the BPT found Shaputis had a 'history of  
15 unstable and tremulous [sic] relationships with others' and had assaulted his wife.

16 The Court ruled that the BPT cannot rely on the bare conviction for 2<sup>nd</sup> degree murder to  
17 deny parole under the exceptionally callous or cruel factor. Because the relevant evidence shows  
18 no conduct (beyond the minimum required for conviction of 2<sup>nd</sup> degree murder) showing a  
19 callous disregard for human suffering, the BPT's use of this factor was arbitrary and capricious.  
20 (Scott, 119 Cal.App. at 891-892)

21 The BPT's finding that Shaputis acted in a dispassionate and calculated manner, in addition  
22 to being inconsistent with the jury's verdict acquitting him of first degree murder, is unsupported  
23 by (and indeed may be irreconcilable with) the evidence on which BPT purported to rely.  
24 Accordingly, the BPT's reliance on this factor was arbitrary and capricious.

25 In the present case, we conclude the record contains no evidence to support the BPT's  
26 articulated reasons for denying parole, and there is nothing in the record to suggest the BPT  
27 would have determined Shaputis posed an unreasonable risk of danger to society without the  
28 reasons we have found are unsupported by the record. Shaputis petition for writ of habeas corpus  
is granted."

1 The Court will note that the facts of this case and the findings of the BPT in Petitioner's  
2 writ are similar in most respects. An independent review of the record clearly  
3 demonstrates that, as in Shaputis, the BPT findings in the instant case were also arbitrary  
4 and capricious in violation of due process. The offense itself cannot support a finding of  
5 unsuitability.

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1 PETITIONER'S RIGHT TO HAVE SEPARATELY STATED AND  
2 SPECIFICALLY DIRECTED (SEPARATE AND DISTINCT) REASONS WHEN  
3 GIVEN A MULTI-YEAR DENIAL WAS NOT PROTECTED BY THE BPT IN  
4 VIOLATION OF HIS STATE AND FEDERAL CONSTITUTIONAL DUE  
5 PROCESS PROTECTIONS AND CONTRADICTORY OF THE LEGISLATIVE  
6 INTENT OF PENAL CODE § 3041.5(b)(2).

7

8 Petitioner's initial hearing was scheduled for August 23, 1999. However, it was not  
9 actually held until December 14, 1999. Almost four (4) months late. At that hearing,  
10 Petitioner received a three (3) year denial. A multi-year separate and distinct set of reasons  
11 was given by the Board. Petitioner's first subsequent parole consideration hearing should  
12 have taken place on December 14, 2002. It actually took place on December 12, 2002.  
13 Petitioner received a one (1) year denial. His next scheduled hearing should have been on  
14 December 12, 2003. It did not take place until May 18, 2004, some five (5) months late.  
15 Again, Petitioner received a one (1) year denial. Petitioner's next scheduled hearing should  
16 have been on May 18, 2005. It was not held until December 6, 2005, close to seven (7)  
17 months late. This time inexplicably Petitioner received a three (3) year denial. The Board  
18 did not give a separate and distinct reason for this drastic departure. Moreover, no  
19 consideration was given to the sixteen (16) months of unexplainable delays on the part of  
20 the Board. (See Exhibit "C")

21 1. The statement of reasons for a multi-year denial must be a separate and distinct  
22 statement that is not a mere recital of the same reasons used to deny parole worded  
23 slightly differently.

24 2. In denying Petitioner parole for a period of two (3) years, the BPT failed to cite  
25 separate and distinct reasons for a multi-year denial.

26 3. The BPT's stated reason for parole denial was:  
27 "The offense in this case was particularly cruel and callous absolutely no motive. It was  
28 certainly carried out in a dispassionate manner." (Exhibit 'A' p. 98)

1       4. In the same breath, the BPT continued with its rationalization for a now multi-year  
2       denial. The Board states:  
3           a) The Board: "We have a problem with minimalization ..." (HT-99) Compare this  
4       with Petitioner's statement: "I am not running away from my actions. I am taking full  
5       responsibility for what I did." (HT-88: 11-12)  
6           b) The Board: "He appears to be attempting to word smith this crime by changes his  
7       description of this from accidental to unintentional act ... downsizing words." (HT-99)  
8       Compare this with Petitioner's actual statement after the Commissioner read the  
9       summary of the crime: "The only thing that I would want to clarify in regards to what  
10      you read there ... as to not confuse anyone here is that in the past ... I've had a little  
11      problem with the use of the word accident, and I just want to make it clear to the panel,  
12      sir, that accidental shooting was my legal defense ... I've always maintained ... the  
13      shooting was the result of an unintentional act." (HT-18: 20-27)  
14           c) The Board: "Not taking responsibility for this particular crime." (HT-100) Compare  
15      with a) above, Psych Report, Counselor's Report, Laudatory Chronos from work  
16      supervisors, Anger Management, and over 15 years of extensive therapy.  
17           d) The Board: "His dishonesty to his wife Cathleen ... that he did not told Cathleen that  
18      Ms. Hall was part of his plan." (HT-100) Compare this with Petitioner's statement:  
19           "The parole plan remains the same ... I would like to go live with her (Cathleen) if I'm  
20      found suitable for parole. However, during one of my previous hearings, the  
21      Commissioner stated ... I would have to have parole plans for San Diego, because of  
22      that I contacted my dear friend Rosie Hall ..." (HT-26: 12-27) [as an alternative]. What  
23      is most interesting about the Board's statement here is that it unreasonably expects  
24      Petitioner's wife to leave her home and community in Morro Bay and establish  
25      residence in San Diego for Petitioner's sake even though she has no idea when  
26      Petitioner is coming home. (HT-103: 16-20) Incredibly, while criticizing, [and  
27      apparently rejecting], Petitioner for presenting Ms. Hall of San Diego as an alternative  
28      plan, the Board insists that -- "We would like to see an alternative plan particularly San  
Diego." (HT-103: 15-16) -- completely disregarding the parole plans presented.

1       5. A multi-year denial can only be applicable when valid grounds exist to find Petitioner  
2       unsuitable for parole. Petitioner has adequately established in his argument ante that the  
3       BPT's reasoning for denying parole was unsubstantiated, lacking even "some  
4       evidence" that he is CURRENTLY an unreasonable risk to the public and was therefore  
5       arbitrary, capricious, lacked basis in fact, and/or was contrary to law. All of the above  
6       statements are refuted by a complete reading of the record, the reports submitted,  
7       Petitioner's statements at the hearing and by existing rules, regulations and laws.

8       **Supporting cases:**

9       "If the Legislature had intended a single statement of reasons to suffice for both the  
10      refusal to set a parole date and the decision to postpone annual review, it would not  
11      have enacted language specifically calling for a statement of reasons on the  
12      latter...Accordingly, this Court holds the Board to the Legislative requirement that its  
13      reasons for postponing a suitability hearing be separately stated and specifically  
14      directed to that question." In re Jackson, (1985) 39 Cal.App.3d 464

15      Penal Code § 3041.5(b)(2) that requires a separate and distinct statement that is not a mere  
16      recital of the same reasons used to deny parole worded slightly differently.

17      Penal Code § 5076.2

18      CCR § 2000(b) (48) [Good Cause]; (61) [Material Evidence]; [Relevant Evidence]

19      CCR § 2400 et seq.

20      California Constitution Article I §§ 7, 15 [Due Process]

21      U.S. Constitution Amendment 14 [Due Process]

22      In re Capistran, (2003) 107 Cal.App.4<sup>th</sup> 1299

23      In re Morrall, 102 Cal.App.4<sup>th</sup> 280

24      In re Rosenkrantz, 95 Cal.App.4<sup>th</sup> 358

25      In re Ramirez, 94 Cal.App.4<sup>th</sup> 549

26      In re Caswell, (10/10/01) 92 Cal.App.4<sup>th</sup> 1017

27      In re Rodriguez, (1975) 14 C.3d 639

28      California v. Morales, (1975) 115 S.Ct. 1597

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## CONCLUSION

The Board's decision was arbitrary and capricious. The Petitioner did not receive a fair hearing, nor will he ever.

Petitioner submits and contends that the finding of unsuitability was arbitrary and capricious:

- 1). Due to the Board carrying out it's political function of adhering to a no or anti-parole policy;
- 2). Due to the Board's acting contrary to the intent and spirit of PC § 3041 (a);
- 3). Due to basing its decisions on unsupported allegations and a retrying of the case; and
- 4). Due to the Board's refusal to adhere to aforementioned decisions and the controlling authorities.

It appears the Board is holding Petitioner to hire standard because of his previous employment with the Marines and the City of San Diego. Petitioner seeks refuge under the U.S. Constitution's 14<sup>th</sup> Amendment "equal protection" clause and this Court's opinion in *In re Shaputis*. It is inconceivable that the Board routinely finds habitual offenders suitable for parole, but not a person with Petitioner's outstanding record.

Petitioner prays this Court order him released and /or discharged, or at the very least, direct the Board to issue a decision within ten (10) days granting parole, setting his term "uniformly" as mandated by the legislature.

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## PRAYER FOR RELIEF

1. Issue an Order to Show Cause on an expedited basis.
2. Appoint Counsel.
3. Conduct an Evidentiary Hearing.
4. Order Petitioner's appearance before the Court.
5. Order Petitioner taken back before the Board for a finding of suitability within ten (10) days, or in the alternative, order Petitioner released forthwith;
6. Declaratory relief, and
7. Any other relief this Court deems fair, just and appropriate.

**PROOF OF SERVICE**

I declare that:

I, PABLO AGRIO, E-17284, am a resident of the State of California, County of Monterey. I am over 18 years of age and I am a party to the within action. My residence address is P.O. Box 689, Soledad, California, 93960-0689.

On February 14th 2006 I served the foregoing Reply to Respondent's Informal Response on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid in the United States mail at Soledad, California, addressed as follows:

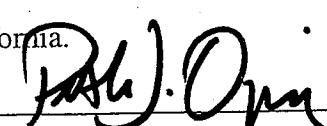
SUPERIOR COURT OF SAN DIEGO  
State of California  
220 W. Broadway  
San Diego, CA 92101-3409

DEPUTY ATTORNEY GENERAL  
DARRELL LEPKOWSKY  
110 WEST A STREET, SUITE 1100  
San Diego, CA 92186-5266

There is regular delivery service by the U.S. Postal Service between the place of mailing and the places so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of February 2006, at Soledad, California.

  
PABLO AGRIO